IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

CHARLES M. ROBINSON, Plaintiff, v. ALLEN C. WEISS, M.D.; GORDON OSTRUM, SR., M.D., MEDICAL DIRECTOR, GANDER HILL PRISON; JOHN/JANE DOE, DIRECTOR OF PSYCHIATRIC SERVICES, STATE OF DELAWARE CORRECTIONAL SYSTEM; JOHN/JANE DOE, M.D., MEDICAL DIRECTOR, STATE OF DELAWARE CORRECTIONAL SYSTEM; PRISON HEALTH SERVICES, INC.; SHERESE BREWINGTON-CARR, WARDEN, GANDER HILL PRISON; STANLEY TAYLOR, COMMISSIONER, DEPARTMENT OF CORRECTION, STATE OF DELAWARE; BRIAN FLICK, UNITED STATES DEPUTY MARSHAL; STEVEN CONBOY, DEPUTY SUPERVISOR UNITED STATES MARSHAL; and JOHN/JANE DOES, SUPERVISORS, UNITED STATES MARSHAL SERVICE, DISTRICT OF DELAWARE, Defendants.	Civil Action No. 00-345-SLR

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MEMORANDUM OPINION

Dated: March 19, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Charles M. Robinson, a former pretrial detainee of the Multi Purpose Criminal Justice Facility in Wilmington, Delaware ("Gander Hill"), brought this civil rights action against several defendants associated with Prison Health Services, Inc. ("PHS") and the United States Marshal Service. The named defendants include Allen C. Weiss, M.D. ("Weiss"); Gordon Ostrum, Sr., M.D. ("Ostrum"); PHS; Gander Hill Warden Sherese Brewington-Carr ("Brewington-Carr"); Department of Correction Commissioner Stanley Taylor ("Taylor"); United States Deputy Marshal Brian Flick ("Flick"); and Deputy Supervisor United States Marshal Steven Conboy ("Conboy").[1] Unnamed defendants include the Director of Psychiatric Services for the State of Delaware Correctional System ("Psychiatric Director"), the Medical Director for the State of Delaware Correctional System ("Medical Director"), and supervisors of the United States Marshal Service for the District of Delaware ("Marshal Supervisors").

Plaintiff's causes of action include (1) a § 1983[2] action against defendants Weiss, Ostrum, Medical Director, Psychiatric

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[1]Defendants Flick and Conboy are hereinafter referred to collectively as "the federal defendants."

[2]Section 1983 of the Civil Right Act, 42 U.S.C. § 1983 (1994).

Director, Brewington-Carr, and Taylor; (2) a Bivens[3] action against Flick, Conboy, and Marshal Supervisors; (3) malpractice claims against Weiss and PHS; (4) a negligent infliction of emotional distress claim against Weiss and PHS; and (5) an intentional infliction of emotional distress claim against Weiss and PHS.

Currently before the court are motions to dismiss filed by PHS (D.I. 38), Weiss and Ostrum (D.I. 34), and the federal defendants (D.I. 24).[4]

II. BACKGROUND

Plaintiff's complaint[5] alleges that while a pretrial detainee housed at Gander Hill on federal criminal charges, he was involuntarily administered an anti-psychotic drug, Prolixin Deconoate ("Prolixin"), pursuant to the orders of Weiss on August 6, 1997. (D.I. 22, ¶ 15-16, 20, 27) The next day, detention and preliminary hearings were scheduled in the United States District Court for the District of Delaware before the Honorable Mary Pat Thynge.[6] Plaintiff, while under the custody of defendant United

[3]Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Plaintiff alleges violations of his Fifth and Eighth Amendment rights.

[4]The federal defendants ask in the alternative for summary judgment.

[5]All references to the "complaint" refer to plaintiff's third amended complaint. (D.I. 22)

[6]At the time the complaint was filed, United States Magistrate Judge Mary Pat Thynge's sir name was Trostle.

States Deputy Marshal Flick, appeared before Magistrate Judge Thynge at which time plaintiff's criminal attorney, Assistant Federal Public Defender Christopher Koyste, informed the court that plaintiff was barely able to communicate with him, was drooling out of his mouth, and appeared to be in a catatonic state. (Id., ¶ 31) Because of her concern for plaintiff's health, Magistrate Judge Thynge ordered defendant Flick to take plaintiff to St. Francis Hospital instead of Gander Hill. (Id., ¶ 32) Defendant Flick, with the knowledge and approval of defendant Deputy Supervisor Conboy and other Marshal Supervisors, returned the plaintiff to Gander Hill instead of St. Francis Hospital. (Id., ¶ 33) On August 11, 1997, plaintiff was transferred from Gander Hill and admitted to St. Francis Hospital's intensive care unit after an emergency room evaluation. At the time of his admission, plaintiff was unresponsive and dehydrated. He had high blood pressure, a rapid heart rate, a fever of 105 degrees Fahrenheit, and a low level of oxygen in his blood. Plaintiff had pneumonia and was diagnosed with Neuroleptic Malignant Syndrome. (Id., ¶ 34) Plaintiff remained at St. Francis Hospital until his return to Gander Hill on August 27, 1997. (Id., ¶ 37)

Plaintiff alleges that because of the defendants' actions, he suffered various injuries and conditions including permanent brain damage and severe emotional stress. (Id., ¶ 36) As to the specific defendants, plaintiff alleges that Ostrum, the Medical

Director, and the Psychiatric Director failed to ensure that proper policies and procedures were implemented at Gander Hill to meet the psychiatric needs of inmates despite prior knowledge of deficiencies. Their failure to implement such policies and procedures, plaintiff alleges, constituted a deliberate indifference to plaintiff's serious medical and psychiatric needs and violated his constitutional rights. (Id., ¶ 38) Plaintiff alleges that defendant Brewington-Carr, as warden of Gander Hill, and defendant Taylor, as Commissioner for the Department of Correction, knew of deficiencies in the care given to inmates with psychiatric needs and failed to ensure that proper policies and procedures were implemented to meet those needs. (Id., ¶ 39)

Plaintiff's complaint states that he "did not file a grievance with either Gander Hill Prison, the State of Delaware Department of Correction or the Federal Bureau of Prisons . . . ." However, by letter of July 11, 2000, plaintiff's counsel indicated to the court that he just learned that plaintiff had, in fact, filed a grievance with Gander Hill. (D.I. 51) On August 15, 2000, plaintiff's counsel submitted the medical grievance that plaintiff filed on April 1, 1998, regarding the subject of this action. (D.I. 54) According to a letter from the Delaware Attorney General's office, the medical grievance was marked "resolved" in the logbook. (Id.)

III. DISCUSSION

A. Defendants' Motions to Dismiss

In deciding a motion to dismiss, a court primarily must consider the allegations contained in the complaint, although matters of public record, orders, items appearing in the record of the case as well as exhibits attached to the complaint may also be taken into account. See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). The court must accept as true all material allegations of the complaint, and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46, (1957). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). With these rules in mind, the court turns to an examination of the sufficiency of plaintiff's complaint.

1. Motions to Dismiss by (1) PHS and (2) Weiss and Ostrum.

Both motions to dismiss are based solely on the fact that plaintiff failed to exhaust his administrative remedies prior to filing suit pursuant to 42 U.S.C. § 1983. See 42 U.S.C. § 1997e(a) ("[n]o action shall be brought with respect to prison conditions under [§ 1983] by a prisoner . . . until such administrative remedies as are available are exhausted"). Since the time that PHS and Weiss filed their motions to dismiss, plaintiff has demonstrated that he, in fact, filed a medical grievance regarding the incident in this case. Although the motions were meritorious at the time they were filed, the court now denies them in light of the newly recovered public record discovered by plaintiff's counsel.

2. Motions to Dismiss by the Federal Defendants.

The federal defendants seek dismissal of the complaint or in the alternative for summary judgment. They seek dismissal because (1) the claims are barred by absolute immunity, (2) the claims are barred by qualified immunity, and (3) the complaint otherwise fails to state a claim for which relief can be granted or over which this court can take jurisdiction.

a. Absolute Immunity

Plaintiff brings this action against the federal defendants under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), which provides a remedy against federal officials for violations of federal rights. (D.I. 22, ¶1) The complaint describes the federal defendants as follows:

> 12. Defendant Brian Flick, is an adult individual, who at all times hereto was employed by the United States Marshal Service as a Deputy Marshal and assigned to the District of Delaware. At all times herein, defendant acted under color of federal law. **He is sued in his individual capacity.**
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> 13. Defendant, Steven Conboy, is an adult individual employed by the United States Marshal Service as a Deputy Supervisor and assigned to the District of Delaware. At all times herein, defendant acted under color of federal law. **He is sued in his individual capacity.**
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> 48. In and around August 1997, defendants Flick, Conboy, and [Marshal Supervisors] were assigned with the care and custody of plaintiff Charles M. Robinson.
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> 49. During the period of time that plaintiff was in the custody of the U.S. Marshall's [sic] office, defendants Flick, Conboy, and [Marshal Supervisors] were aware of plaintiff's medical/psychiatric conditions and his serious need for competent medical attention.
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> 50. Defendants Flick, Conboy, and [Marshal Supervisors] knew of the risk of harm to plaintiff when they denied plaintiff access to reasonable and competent

> medical/psychiatric care by transporting plaintiff to Gander Hill Prison instead of transporting him to nearby St. Francis Hospital on August 7, 1997.
>
> 51. Defendants Flick, Conboy, and [Marshal Supervisors] violated plaintiff's federal constitutional rights under the Fifth and Eight Amendments to the United States Constitution when they denied plaintiff access to reasonable and competent medical/psychiatric care for his serious medical needs. Defendants['] acts and omissions constituted deliberate indifference to plaintiff's serious medical needs and cruel and unusual punishment.

(D.I. 22) (emphasis added).

Sovereign immunity bars claims against federal officials in their official capacity unless a waiver is unequivocally expressed by Congress. United States v. Mitchell, 445 U.S. 535, 538 (1980). The United States Supreme Court noted that a suit against a federal official in his official capacity is really a suit against the United States. Kentucky v. Graham, 473 U.S. 159, 166 (1985). The United States cannot be sued absent a Congressional waiver of the government's sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1976). The court is not aware of any case whereby the United States waived its sovereign immunity from suit for the alleged constitutional torts of its employees.

The federal defendants argue that the complaint should be dismissed because the allegations only allege acts taken by the federal defendants in their official capacity within the course

and scope of their employment. The federal defendants contend that there is not a single factual averment in the complaint to suggest that the federal defendants were acting in any capacity other than their official capacity. (D.I. 24 at 7) Plaintiff agrees that a Bivens suit cannot be brought against an official acting in his official capacity. (D.I. 56 at 14) Plaintiff merely notes that his complaint charges the federal defendants in their "individual capacity." The issue for the court is thus, when is a federal employee acting in his "official capacity," in which case the suit is barred by sovereign immunity, and when is he acting "under color of law," in which case a Bivens suit may lie against him individually? Since the complaint clearly indicates that the federal defendants are being sued in their "individual capacity," the federal defendants are not entitled to absolute immunity on this record.

b. Qualified Immunity

To the extent they are not cloaked with absolute sovereign immunity, the federal defendants argue they are entitled to qualified immunity. Qualified immunity acknowledges "the fact that subjecting public officials to personal liability for their discretionary actions results in the distractions of these officials from their public duties." Ryan v. Burlington County, 889 F.2d 1286, 1292 (3d Cir. 1989).

The burden of establishing entitlement to qualified immunity

rests with the defendant official. See Ryan, 860 F.2d at 1204 n.9. Government officials performing their discretionary functions are generally immune from liability for civil damages, provided that their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person should have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); In re City of Philadelphia Litig., 49 F.3d 945, 961 (3d Cir. 1995). A right is "clearly established" when the contours of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates the law." Hynson v. City of Chester Legal Dep't, 864 F.2d 1026, 1031 (3d Cir. 1988); see generally Anderson v. Creighton, 483 U.S. 635, 641 (1987). Thus, the qualified immunity defense rests upon the objective reasonableness of the official's action in light of clearly established law and the information possessed by the official at the time of the violation. Id. at 641.

The Third Circuit has determined that a more flexible approach may be used to determine the "sufficiently clear" standard. See Good v. Dauphin County Soc. Servs. for Children & Youth, 891 F.2d 1087, 1092 (3d Cir. 1989). In Good, the Third Circuit held that "sufficiently clear" does not mean that the very action needed to have been decided, but in light of preexisting law the unlawfulness must be apparent. Id. at 1092. Thus, previous precedent directly on point is not needed to demonstrate that the law is clearly established and immunity

should be denied.

The "clearly established" right that plaintiff claims was violated by the federal defendants was the constitutional entitlement to "reasonable medical care for his serious medical needs from those whose custody he is in." (D.I. 56 at 15) In order to state an Eighth Amendment claim for inadequate medical care, plaintiff must show that the federal defendants violated a two part test. Plaintiff must show (1) that the federal defendants acted with deliberate indifference towards him and (2) that he had serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). As with all § 1983 claims, plaintiff must show that a state actor deprived him of a constitutionally protected right. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

The federal defendants argues that the complaint fails to allege a serious medical need at the time he was transported from the District Court to Gander Hill. They note that plaintiff was not admitted to St. Francis Hospital until four days after being taken back to Gander Hill. (D.I. 22, ¶ 34) This, the federal defendants allege, shows that at the time the federal defendants transported him back to Gander Hill, a serious medical need did not exist.

Plaintiff notes that the complaint clearly alleges that the federal defendants "were aware of plaintiff's medical/psychiatric conditions and his serious need for competent medical attention." (D.I. 22, ¶ 49) Plaintiff argues that he has sufficiently pled

that a serious medical need was present at the time he was in the federal defendants' custody and that they were aware of it when they took plaintiff to Gander Hill instead of St. Francis Hospital.

Plaintiff has met his burden here. Plaintiff's medical condition was serious enough to convince Magistrate Judge Thynge to order that plaintiff be taken to St. Francis Hospital and not back to Gander Hill. While the court appreciates the limited resources of the United States Marshal, nonetheless, the federal defendants are not doctors and the court declines to hold that the federal defendants, as a matter of law, were qualified to determine whether plaintiff's medical condition was serious or constituted a medical emergency. Plaintiff's complaint, therefore, adequately alleges that his medical condition was serious and that the federal defendants acted with deliberate indifference towards plaintiff. The federal defendants are not entitled to qualified immunity on the record presented, and their motion to dismiss is denied.

B. Federal Defendants' Motion for Summary Judgment

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In support of its motion for summary judgment, the federal defendants include, as evidence, (1) an Intergovernmental

Agreement ("IGA") between the Delaware Department of Correction and the U.S. Marshal Service; (2) the transcript of the hearing before Magistrate Judge Thynge; and (3) a declaration from defendant Conboy. In his declaration, defendant Conboy said that after Magistrate Judge Thynge ordered that plaintiff be taken to St. Francis Hospital, he called Magistrate Judge Thynge to tell her that the Marshal Service transported detainees to Gander Hill unless there was an emergency. He told Magistrate Judge Thynge what medication plaintiff had taken and he believed that Magistrate Judge Thynge was "fully informed as to where Mr. Robinson was being housed and treated . . . ." (D.I. 24, Tab 4)

Plaintiff argues that granting summary judgment without discovery would be premature in this case. The court agrees. Therefore, the federal defendants' motion for summary judgment is denied. An appropriate order shall issue.

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FOR THE DISTRICT OF DELAWARE

CHARLES M. ROBINSON, Plaintiff, v. ALLEN C. WEISS, M.D.; GORDON OSTRUM, SR., M.D., MEDICAL DIRECTOR, GANDER HILL PRISON; JOHN/JANE DOE, DIRECTOR OF PSYCHIATRIC SERVICES, STATE OF DELAWARE CORRECTIONAL SYSTEM; JOHN/JANE DOE, M.D., MEDICAL DIRECTOR, STATE OF DELAWARE CORRECTIONAL SYSTEM; PRISON HEALTH SERVICES, INC.; SHERESE BREWINGTON-CARR, WARDEN, GANDER HILL PRISON; STANLEY TAYLOR, COMMISSIONER, DEPARTMENT OF CORRECTION, STATE OF DELAWARE; BRIAN FLICK, UNITED STATES DEPUTY MARSHAL; STEVEN CONBOY, DEPUTY SUPERVISOR UNITED STATES MARSHAL; and JOHN/JANE DOES, SUPERVISORS, UNITED STATES MARSHAL SERVICE, DISTRICT OF DELAWARE, Defendants.	Civil Action No. 00-345-SLR

CORRECTED ORDER*

At Wilmington this 19th day of March, 2001, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Defendant PHS's motion to dismiss (D.I. 38) is denied.

2. Defendants Weiss and Ostrum's motion to dismiss *(D.I. 34) is denied.

3. The federal defendants' motion to dismiss or in the alternative for summary judgment (D.I. 23) is denied.

United States District Judge